

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STEVEN C. SEIFERT, SR.
Claimant

VS.

GILL STUDIOS, INC.
Respondent

AND

EMPLOYERS MUTUAL CASUALTY CO.
Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 159.795

ORDER

ON the 24th day of March, 1994, the application of the respondent and its insurance carrier for review by the Workers Compensation Appeals Board of an Order entered by Administrative Law Judge Steven J. Howard dated February 14, 1994, came on for oral argument in person and by telephone conference.

APPEARANCES

Claimant appeared by his attorney Daniel L. Smith, in person, of Overland Park, Kansas. The respondent and insurance carrier appeared by and through their attorney Mark E. Kolich, of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney Karen D. Rein, of Overland Park, Kansas. There were no other appearances.

RECORD

The record considered for purposes of this appeal consist of the documents on file with the Division of Workers Compensation in this docketed matter, including the transcript of proceedings held on August 3, 1993, and February 8, 1994, before Administrative Law Judge Steven J. Howard.

ISSUES

The threshold question in this case is whether the Appeals Board has jurisdiction to review the Order of Administrative Law Judge Steven J. Howard dated February 14, 1994, concerning respondent's Motion for Reconsideration.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is the Appeals Board's understanding from the review of the Administrative Law Judge's file that this case has been litigated to the point of being submitted for decision except for this appeal. The Order which is the subject of this appeal is a result of a hearing held on the respondent's Motion for Reconsideration that was heard by Administrative Law Judge Steven J. Howard on February 8, 1994.

Administrative Law Judge Howard's Order dated February 14, 1994, essentially rules that the deposition of Robert Coleman, M.D., taken April 12, 1993, is inadmissible due to the physician's failure to comply with the provisions of K.S.A. 44-515. K.S.A. 44-515 provides in relevant part, that upon request, an employee submitting to an examination shall have delivered a copy of the health care provider's report of examination within 15 days after the examination.

In the case at hand, claimant made demand upon the respondent for all relevant reports as provided for pursuant to the provisions of K.S.A. 44-515. A medical examination was then conducted of the claimant at the request of the respondent by Dr. Robert Coleman on April 12, 1993. Dr. Coleman's report was received by the respondent's counsel on June 11, 1993, and immediately forwarded to counsel for the claimant. The doctor's deposition was taken on June 25, 1993, and the claimant's counsel during the deposition raised an objection to the doctor's testimony based on K.S.A. 44-515(a). K.S.A. 44-515(c) goes on to provide that unless a report is furnished as provided in subsection (a), the health care provider shall not be permitted to testify as to the condition of the employee at the time that his examination was made.

This issue was first raised by the respondent in an Application to Consider Deposition filed on July 2, 1993, requesting the Administrative Law Judge to rule on the claimant's objection to Dr. Coleman's deposition on the basis of K.S.A. 44-515. The hearing was held concerning the application on August 3, 1993. Administrative Law Judge Howard issued an Order dated August 4, 1993, ordering that Dr. Coleman's deposition of June 25, 1993, was inadmissible pursuant to K.S.A. 44-515 and giving the respondent an additional 30 days in which to submit his case.

The respondent filed an Application for Director's Review of the Administrative Law Judge's Order which was heard by Assistant Director David A. Shufelt on September 8, 1993. The Assistant Director issued an order on December 6, 1993, which affirmed in all respects Administrative Law Judge Howard's Order of August 4, 1993.

Thereafter, the respondent filed a Motion for Reconsideration on January 26, 1993, and this motion was heard by Administrative Law Judge Howard on February 8, 1994. Administrative Law Judge Howard then issued the order which is the subject of this review on February 14, 1994.

The basis of the respondent's Motion for Reconsideration is that the Appeals Board, on January 18, 1994, in the case of Sharon Oldham v. J.C. Penney Company, Inc., and Liberty Mutual Insurance Company, Docket Nos. 159,046 and 159,047, found that in absence of finding of unfair surprise or prejudice directly caused by the failure or delay in providing a health care provider's report, the testimony of a health care provider should not be excluded pursuant to K.S.A. 44-515.

With respect to the jurisdictional question, the respondent contends that the Appeals Board has jurisdiction to review the Administrative Law Judge's Order which is subject to this appeal pursuant to K.S.A. 44-551(b)(1) which provides in relevant part, that all acts, findings, awards, decisions, rulings or modifications of findings or awards of the Administrative Law Judge shall be subject to review by the Appeals Board.

The claimant argues that the Administrative Law Judge's Order is an interlocutory order made during the trial of the case on an evidentiary matter. Claimant contends such order is neither a preliminary hearing order that is subject to review pursuant to K.S.A. 44-534a(a)(2), nor a final order subject to review pursuant to K.S.A. 44-551(b)(1).

The Appeals Board finds, after examining both K.S.A. 44-551 and K.S.A. 44-534a, that the subject order is not a final order that can be reviewed by the Appeals Board pursuant to K.S.A. 44-551 nor does it raise a jurisdictional issue that can be reviewed pursuant to K.S.A. 44-534a. This order is simply an evidentiary ruling that the Administrative Law Judge has the authority to make during the trial of a workers compensation case. The Appeals Board finds it does not have jurisdiction to review such an evidentiary ruling until such time it is included in the final award of the Administrative Law Judge, whereupon the Appeals Board would have jurisdiction pursuant to K.S.A. 44-551(b)(1).

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Order of Administrative Law Judge Steven J. Howard entered February 14, 1994, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of May, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Daniel L. Smith, 6900 College Blvd, Ste 510, Overland Park, Kansas 66211
Mark E. Kolich, PO Box 171855, Kansas City, Kansas 66117-1855
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Steven J. Howard, Administrative Law Judge
George Gomez, Director